8-2-2011

Idaho Dept. of Health & Welfare v. McCormick Appellant's Brief Dckt. 38694

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF: GEORGE D. PERRY,	)	
IDAHO DEPARTMENT OF HEALTH AND WELFARE,	)	
Petitioner-Appellant,	)	SUPREME COURT NO. 38694
vs.	)	
BARBARA K. MCCORMICK, Personal Representative of the Estate of George D. Perry,	)	
Respondent on Appeal.	)	

APPELLANT'S BRIEF

APPEAL FROM FOURTH JUDICIAL DISTRICT, ADA COUNTY

THE HONORABLE KATHRYN A. STICKLEN, PRESIDING

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Nature of the Case

This is an appeal from an order disallowing a creditor's claim in a probate proceeding. It involves Medicaid, also known as "medical assistance," and estate recovery, as provided in Idaho Code § 56-218. Estate recovery is a program, required by federal law and authorized by state statute and rules, that seeks to recover assets of deceased Medicaid recipients to reimburse the state and federal treasuries for medical payments made on behalf of Medicaid recipients. This matter involves a claim filed by the Idaho Department of Health and Welfare (hereinafter the "Department") in the estate of the deceased spouse of a Medicaid recipient.

Course of Proceedings

The personal representative was appointed on March 19, 2009. The Department filed a contingent[1] claim, in the amount of $106,251.08, on April 15, 2009. On June 2, 2009, a Notice of Disallowance of Claim was filed by the personal representative. On June 15, 2009, the Department filed its Petition for Allowance of Claim. Hearing was held on the Department's Petition on February 26, 2010. On March 10, 2010, Judge Bieter issued his Order Disallowing Claim.

The Department appealed to the District Court by filing a Notice of Appeal on March 18, 2010. Oral argument on appeal was heard by the Honorable Kathryn A. Sticklen on November 18, 2010. Judge Sticklen entered her Memorandum Decision and Order affirming Judge Bieter on March 16, 2011. This appeal followed.

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[1]Idaho Code § 15-3-810. The claim was contingent because the Medicaid recipient was still living.

Statement of the Facts

George D. Perry ("George") was born [redacted] and died February 25, 2009, at the age of 79. R. pp. 7, 11. Martha J. Perry ("Martha") was born [redacted] and died May 3, 2010.[2] Martha was previously known as Martha Jean Boyle and, no later than September 18, 1977, was the owner, as her sole and separate property, of certain real property in Ada County. R. p. 133. At some point in time later, Martha and George were married. On November 18, 2002, Martha executed a Quitclaim Deed, with the grantor named as "Martha Jean Boyle" and the grantee as "Martha Jean Perry & George Donald Perry." R. p. 134. On March 3, 2005, Martha executed a general durable power of attorney, naming George as her attorney-in-fact. R. pp. 433-9. About July 31, 2006, George purported to transfer Martha's interest in the real property to himself, signing a Quitclaim Deed on behalf of Martha using the power of attorney. R. p. 99. About September 15, 2006, George and Martha applied to the Department for medical assistance to help pay for Martha's medical care. From October 1, 2006, until her death, the Department provided payment for Martha's medical care, through the Medicaid program. The primary asset of the estate was the couple's real property which was sold by the personal representative netting $81,688.95. R. p. 106.

[2]Martha Perry was still living at the time of the Department's original claim in this estate.

ISSUES ON APPEAL

1. Whether the Magistrate erred in holding that George Perry, through a general power of attorney, had the power to divest Martha Perry of her interest in the couple's home, and gift that interest to himself, even though the power of attorney did not include any gifting power.

2. Whether the Magistrate erred in holding that Idaho Code § 56-218(1) – which authorizes recovery from the estate of the spouse where the assets had been community property, or had been the property of the Medicaid spouse – is preempted by federal law.

ARGUMENT

I.

STANDARD OF REVIEW

As explained in *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 563, 249 P.3d 362 (2011):

> In an appeal from the district court, acting in its appellate capacity, this Court:
>
> > reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.
>
> *Nicholls v. Blaser*, 102 Idaho 559, 561, 633 P.2d 1137, 1139 (1981), *quoted* in *Doe v. State*, 137 Idaho 758, 759–60, 53 P.3d 341, 342–43 (2002).

Idaho Dept. of Health & Welfare v. Doe, 150 Idaho at ___, 249 P.3d at 364-5. Moreover, as stated in *Carter v. Carter*, 143 Idaho 373, 146 P.3d 639 (2006):

> When reviewing the decision of a district court acting in its appellate capacity over the magistrate division, this Court reviews the magistrate court's decision independently of, but with due regard for, the district court's intermediate appellate decision. This Court will uphold the magistrate court's findings of fact if they are supported by substantial, competent evidence in the record.

Carter v. Carter, 143 Idaho at 378, 146 P.3d at 645. If there are no genuine issues of fact, the Court freely reviews the issues of law. *Doe v. Idaho Dept. of Health & Welfare*, 150 Idaho 491, ___, 248 P.3d 742, 746 (2011).

II.

DECISIONS BELOW

The threshold issue before both the Magistrate and the District Court was whether the General Durable Power of Attorney (R. pp. 433-9) was sufficient to support George's conveyance of Martha's property to himself. If Martha still had an interest in the property at the time of her death, then the second issue, relating to preemption, is never reached. The Department contended the conveyance was not valid because the power of attorney did not contain any authority to make gifts of Martha's property, nor did it contain any authority permitting self-dealing. The Magistrate's discussion of this issue in his Order Disallowing Claim (R. pp. 505-11) is confined to a footnote:

> The court has determined that George Perry held a valid power of attorney from Martha and that he had the authority to transfer the property to himself.

Order Disallowing Claim, p. 1 (R. p. 505). The District Court, for its part, held that express gifting authority was not necessary, and affirmed the Magistrate.

The other issue in both the Magistrate and District Court was whether Idaho's law permitting recovery of assets transferred by the Medicaid spouse to the non-Medicaid spouse is preempted by federal law. While the Magistrate never mentions "preemption," both decisions below were based on the reasoning in *Estate of Barg*, 752 N.W.2d 52 (Minn. 2008). The *Estate of Barg* case held, in essence, that if the Medicaid spouse conveys her property to the non-Medicaid spouse before death, then that property is out of reach of Medicaid estate recovery because recovery can only be made from the remaining, often negligible, estate of the Medicaid

recipient. The *Barg* court held that Minnesota's law permitting recovery from the estate of the non-Medicaid spouse was preempted by federal law.

The Department contended the *Barg* case should not be applied in Idaho because the case of *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998) and the case of *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000) demonstrate that the federal definition of "asset" found in 42 U.S.C. § 1396p(h) – never considered in *Barg* – includes property transferred to the Medicaid recipient's spouse, and therefore, recovery of such property from the estate of the spouse is not preempted.

The Magistrate did not believe the definition of "assets" in section 1396p(h) was relevant. Order Disallowing Claim, p. 4 (R. p. 508). The Magistrate, therefore, found the reasoning in *Barg* was persuasive and disallowed the Department's claim, effectively finding Idaho's spousal recovery law is preempted.

The District Court, for its part, believed that the definition of "assets" in subsection (h) excluded the couple's real property. Memorandum Decision and Order, p. 9 (R. p. 713). This conclusion was based primarily on the mistaken belief that the definition of "resources" in section 1396p(h) did not include the couple's home. *Id.*

III.

THE POWER OF ATTORNEY DID NOT AUTHORIZE GEORGE PERRY TO MAKE A GIFT TO HIMSELF OF MARTHA'S PROPERTY.

Martha Perry brought the real property into the marriage as her sole and separate property. R. p. 133. She later conveyed the property to herself and to George, presumably making the property the couple's community property. R. p. 134. *See* Idaho Code § 32-906; *Dunagan v.*

Dunagan, 147 Idaho 599, 602, 213 P.3d 384, 387 (2009). George later attempted to convey Martha's remaining interest to himself, executing a Quitclaim Deed to himself as Martha's agent by virtue of the power of attorney. R. p. 99. This attempted conveyance was invalid, however, because the general power of attorney contains no provision authorizing the agent to make gifts of the principle's property to himself or anyone else. R. pp. 433-9.

The District Court disagreed that express authorization to make gifts was required in the power of attorney:

> The power of attorney was executed in 2005 prior to the enactment of the current Uniform Power of Attorney Act, Idaho Code § 5-12-101 et seq, in 2008. The present act requires express authority to make gifts, but it is not applicable here. No authority has been cited requiring such language prior to the adoption of the act. Based on the record before it, this Court affirms the interpretation by the magistrate.

Memorandum Decision and Order, p. 5 (R. p. 709). The District Court may have overlooked the substantial authority the Department cited at pages 27 to 30 of Appellant's Brief. (R. pp. 551-4).

3 Am. Jur. 2d Agency § 87 plainly states that "The authority of an agent to make a gift on behalf of the principal must be express." Case law has uniformly supported this view. In *Kunewa v. Joshua*, 83 Hawaii 65, 924 P.2d 559, 565 (Haw.Ct.App.1996), the court explained:

> Moreover, courts have routinely held that in the absence of express written authorization, an agent may not gratuitously convey the principal's property to himself. *See, e.g.*, *Hodges v. Surratt*, 366 So.2d 768 (Fla.App.1978) (agent exceeded authority in appropriating for agent's own use funds in decedent principal's checking account in the absence of clear language to that effect in the power of attorney), *cert. denied*, 376 So.2d 76 (Fla.1979); *In re Estate of DeBelardino*, 77 Misc.2d 253, 352 N.Y.S.2d 858, 863 (Sur.Ct.1974) (power of attorney, no matter how broadly drawn, cannot be held to encompass an authorization to attorney-in-fact to make gift to himself of principal's property; such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of principal's intent to make the gift), *aff'd*, 47 A.D.2d 589, 363 N.Y.S.2d 974 (1975).

Kunewa, 83 Hawaii at 71, 924 P.2d at 565 (underline added); *see also Matter of Estate of Crabtree*, 550 N.W.2d 168 (Iowa,1996) (absent express grant in power of attorney, of power to make gift, attorney-in-fact did not have that power); *Aiello v. Clark*, 680 P.2d 1162, 1166 (Alaska 1984) (in the absence of express authority to make a gift, none may be made); *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998) (no gift may be made by an attorney in fact to himself unless the power to make such a gift is expressly granted in the instrument itself).

As stated in 73 A.L.R. 884 – **Power of attorney as authorizing gift or conveyance or transfer without a present consideration**:

> According to the established rule, powers of attorney will be given a narrow and restricted construction, and will be held to grant only those powers which are expressly specified and such others as are essential to carry into effect the expressed powers.
>
> * * *
>
> A general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and <u>does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal</u>.

73 A.L.R. 884 at ___ (citations omitted; underline added).

Idaho has long followed these same principles. In Idaho, powers of attorney are strictly construed to not authorize acts beyond those specified. In the case of *Arthur v. Kilpatrick Bros. Co.*, 47 Idaho 306, 274 P. 800 (1929) the plaintiff in a quiet title action died following judgment for the defendant, but before the notice of appeal was filed. The plaintiff's son, holding a power of attorney, purported to convey the property to another relative who sought to substitute-in to continue the appeal. The Court, however, found that the power of attorney was insufficient to authorize the conveyance of the real property to another:

> The instrument is denominated "special power of attorney," and admittedly does not expressly give Edward B. Arthur the power to convey real estate of Edward J. Arthur, but grants him "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises (concerning all property belonging to Edward J. Arthur within the State of Idaho) as fully to all intents and purposes as he might or could do if personally present, hereby ratifying and confirming all that his said attorney, Edward B. Arthur shall lawfully do or cause to be done by virtue of these presents." It is seen that this power of attorney contains no authority to convey real estate, *eo nomine*, and as such instruments are subject to strict interpretation, without regard to parol evidence, and are not to be construed as authorizing acts beyond those specified, our conclusion is that the deed to Catherine J. Arthur was ineffective by reason of insufficiency of the power of attorney to authorize conveyance of real estate. It follows, therefore, that the request of Catherine J. Arthur to be substituted as appellant in the cause and to continue the same in her name and right must be denied.

Arthur v. Kilpatrick Bros. Co., 47 Idaho at ___, 274 P. at 801 (citation omitted; underline added); *see also Eaton v. McWilliams*, 52 Idaho 145, 12 P.2d 259 (1932) ("a power of attorney to sell lands must be strictly construed and cannot be extended by construction").

Also, an agent may only act for the benefit of his principle. In the case of *Jensen v. Sidney Stevens Implement Co.*, 36 Idaho 348, 210 P. 1003 (1922), the Idaho Supreme Court said:

> . . . [I]f an agent makes any profit in the course of his agency because of his failure to inform his principal of facts known to him, or which in the exercise of due diligence he should have ascertained for his principal, the profits of such transaction, as a matter of law, will belong exclusively to the agent's principal. The law guards the fiduciary relation, which the relation of principal and agent is, with jealous care. It seeks to prevent the possibility of a conflict between duty and personal interest. It demands that the agent shall work with an eye single to the interest of his principal. It forbids him from acting adversely to his principal, either for himself or for others.

Jensen, 36 Idaho at __, 210 P. at 1005 (underline added). In this case, the agent not only made a gift of the principle's property, but he made it to himself.

The District Court may have been under the impression that George's conveyance of Martha's property interest to himself was in furtherance of Martha's Medicaid eligibility. In the statement of facts the court wrote:

> To qualify for government assistance with medical costs, the couple and Martha, individually, could not exceed certain maximum asset criteria. On or about July 31, 2006, George made the transfer now in dispute, assigning Martha's remaining interest in the real property to himself alone, by signing a quitclaim deed on behalf of Martha pursuant to a power of attorney.

Memorandum Decision and Order, pp. 1-2 (R. pp. 705-6). If this was the Court's belief, it is mistaken. As discussed below, for purposes of Medicaid eligibility, the home is not counted as a resource. 42 U.S.C. § 1382b(a)(1). There was no benefit to Martha from George's conveyance.

While Idaho only recently codified the long standing rule that for an agent to make gifts of the principle's property an express authorization is required, Idaho Code § 32-912 has long required an "express power of attorney" for one spouse to convey or encumber community property:

> **32-912. Control of community property.** – Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may **by express power of attorney** give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated.

Idaho Code § 32-912 (emphasis added). The title company may have recognized this defect when it required the signature of Martha on the closing statement when the personal representative sold the real property.[3] R. p. 106.

The term "express power of attorney" must mean more than a general authorization. Blacks Law Dictionary, 5th Edition, defines "express" as follows:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

Blacks Law Dictionary, 5th Edition (citation omitted). There is no express language in the power of attorney at issue. At best, there is authority to sell, for fair value. Any authority to make gifts at all, much less to oneself, must be implied, and is not "express."

The District Court erred in holding that no express gifting authority was required to authorize George Perry to convey Martha's real property interest to himself.

IV.

THE HOME OF A MEDICAID RECIPIENT AND HER SPOUSE IS AN "ASSET" AS DEFINED IN FEDERAL ESTATE RECOVERY LAW.

A. Idaho Law Permits Recovery from the Estate of the Spouse of a Medicaid Recipient Where the "Assets" Are Traceable to Jointly Owned Property or the Property of the Medicaid Recipient.

Idaho Code § 56-218 authorizes recovery from the estate of both the Medicaid recipient and her spouse:

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[3]Barbara K McCormick signed not only as personal representative for George's estate, but also as attorney in fact for Martha.

> Except where exempted or waived in accordance with federal law medical assistance pursuant to this chapter paid on behalf of an individual who was fifty-five (55) years of age or older when the individual received such assistance may be recovered from the individual's estate, and the estate of the spouse, if any, for such aid paid to either or both;

Idaho Code § 56-218(1) (underline added). IDAPA16.03.09.900.20 and .24 limits the Department's application of this broad authorization to "assets of the estate that had been, at any time after October 1, 1993, community property, or the deceased participant's share of the separate property, and jointly owned property." IDAPA16.03.09.900.20 (3-30-07)[4]

Therefore, Idaho law permits recovery from the estate of either spouse, so long as the assets are traceable to the couple's community property, or the assets had been the property of the Medicaid recipient.

B. Federal Medicaid Law Defines "Assets" to Include Property, Including the Couple's Home, Conveyed to the Non-Medicaid Spouse.

42 U.S.C. § 1396p is the federal statute dealing with Medicaid recovery and asset transfers. 42 U.S.C. § 1396p(b) requires states to seek recovery of Medicaid payments made on behalf of certain individuals, including individuals over the age of 55. Section 1396p(b)(1)(B) states:

> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate . . ..

42 U.S.C. § 1396p(b)(1)(B). In the case of *Estate of Barg*, 752 N.W.2d 52 (Minn. 2008), the Minnesota Supreme Court was convinced that because this section requires recovery from the "individual's" estate, recovery from property transferred to the spouse was not permitted.

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[4]These rules have been renumbered and are now found at IDAPA 16.03.09.905.01 and .05.

However, the *Barg* court never considered the rest of 42 U.S.C. § 1396p, including the special definition of assets found in subsection (h) of that section.

42 U.S.C. § 1396p(b)(4)(B) contains an expanded definition of the term "estate" for purposes of Medicaid estate recovery. Under this section, the recoverable "estate" includes:

> . . . any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4)(B) (underline added). The word "assets" has been underlined because it, too, has a special definition for purposes of Medicaid estate recovery. Subsection (h) of section 1396p provides, in part, as follows:

> (h) **Definitions**
>
> In this section, the following definitions shall apply:
>
> (1) The term "assets", **with respect to an individual**, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action –
>
> (A) by the individual or such individual's spouse,
>
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
>
> (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.
>
> * * *
>
> (5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

42 U.S.C. § 1396p(h) (emphasis added). Therefore, where section 1396p refers to the assets of an "individual," those assets include the assets of the spouse and assets transferred to the spouse.

This special definition of assets was discussed by the Idaho Supreme Court in the case of *Idaho Department of Health and Welfare v. Jackman*, 132 Idaho 213, 970 P.2d 6 (1998).[5] The North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000) relied on this same reasoning to uphold recovery from the estate of the spouse in that state.

C. The District Court Misunderstood a Critical Cross Reference in the Federal Law.

The District Court did not believe that the definition of "assets" in subsection (h) of section 1396p included the couple's home:

> More importantly, the definition of "resources" as listed in 1396p(h)(5), "has the meaning given such term in section 1382b[.]" Thus, the definition of "resources," specifically excludes "the home (including the land that appertains thereto)." 42 U.S.C. 1382b(a)(1). Accordingly, where "resources" as contained in this section (1396p(h)) specifically excludes the home, the Court finds it necessarily excludes it from the definition of "assets" as well. Thus, even with this expanded definition of "assets" applied to § 1396p(b)(4)(A),(B), the Court finds it fails to expand that recovery provision to include real property owned by a recipient prior to death.

Memorandum Decision and Order, p. 9 (R. p. 713) (underline added). Admittedly, the federal law is convoluted and difficult to read with its many cross references to other equally convoluted sections of law. However, the District Court omitted an important part of the definition of "resources."

As noted above, when speaking of the "individual" the assets of the "estate" includes the "resources" of the individual's spouse. 42 U.S.C. § 1396p(h)(1). "Resources" is defined in 20 C.F.R. § 416.1201 to mean, with some qualifications, "cash or other liquid assets or any real or

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[5]The District Court was under the impression that the Department's reliance on *Jackman* was "based largely on the original opinion in that case, which has since been substituted." Memorandum Decision and Order, p. 17. R. p. 721. However, the Department only cited one paragraph of the original decision to explain why the Court made such an extensive discussion of the definition of "assets" in the final opinion. The Department extensively quoted the final *Jackman* decision where the critical language relating to the importance of the definition of "assets" is found. *See* Appellant's Brief, pp. 19-22, 24 (R. pp. 543-6, 548) and Appellant's Reply Brief, pp. 21-23 (R. pp. 676-8).

personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." Section 1382b provides certain exclusions to "resources" that are applicable in determining eligibility for Medicaid. Among these is the exclusion for the family home:

> (a) Exclusions from resources
> In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded –
> (1) the home (including the land that appertains thereto)

42 U.S.C. § 1382b(a)(1). This is why when determining Medicaid eligibility, the family home is not counted as a resource. However, everything changes when it comes to estate recovery which is governed by section 1396p. The definition of "resources" for purposes of estate recovery specifically includes the family home:

> (5) The term "resources" has the meaning given such term in section 1382b of this title, without regard . . . to the exclusion described in subsection (a)(1) of such section.

42 U.S.C. § 1396p(h)(5) (underline added). It is this "without regard" language in the definition that the District Court omitted and overlooked. This means that in determining eligibility, the home is not counted, but for purposes of estate recovery, the family home may be recovered. Therefore, "asset" as defined in section 1396p specifically includes the home that has been conveyed to the spouse.

V.

CONCLUSION

The general durable power of attorney that George Perry attempted to use to convey Martha's community interest in the real property to himself contained no authorization to make

gifts and no express authorization to dispose of Martha's community property. The attempted conveyance was invalid and the question of preemption does not arise in this case.

The District Court did not believe the definition of "assets" in 42 U.S.C. § 1396p(h) was applicable to the expanded definition of "estate" because it concluded that "resources" did not include the couple's real property. That conclusion is in error. The Department's recovery of the couple's home is not preempted, whether it was validly conveyed to George or not.

The Department requests that the decision of the Magistrate be reversed and the Department's claim against this estate be allowed in full.

DATED this 1 day of August, 2011,

W. COREY CARTWRIGHT
Deputy Attorney General

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing document were mailed, postage pre-paid, to the following:

PETER C SISSON
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DATED this 2 day of August, 2011.

Dawn C. Phipps, Legal Assistant